determination that Internet calls are "local traffic" as defined by Interconnection Agreements between Ameritech and several of the defendants, and therefore subject to reciprocal compensation. Ameritech contends that the ICC's decision violates the Telecommunications Act of 1996. A hearing on the merits of the case was held by this court on June 25, 1998. As set forth in this Memorandum Opinion and Order, this court upholds the ICC's decision.

I. PROCEDURAL HISTORY

In 1996, plaintiff Ameritech entered into negotiations for separate Interconnection Agreements with five of the defendants in this case, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation ("Focal") (collectively the "Carrier-defendants"). (Compl. ¶ 16.) In 1996 and 1997 each of the Agreements was approved by the Illinois Commerce Commission ("ICC" or "the Commission"). On September 8, 1997, one of the Carrier defendants, TCG, filed a complaint against Ameritech alleging that Ameritech had violated the terms of its Interconnection Agreement by refusing to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network. (Order at 2.) On October 9 and 10, 1997, WorldCom and MCI filed similar complaints against Ameritech, and the three cases were consolidated on November 4, 1997. (Order at 2.) Subsequently, petitions to intervene were granted as to Focal, AT&T, and others. (Order at 2.)

On March 11, 1998, the ICC entered an Order incorporating factual findings regarding the Carrier defendants' complaints and concluding that Ameritech had violated its Interconnection

Agreements. On March 27, 1998, Ameritech filed the instant suit against the Carrier defendants and the Commissioner of the Illinois Commerce Commission ("the Commissioners") seeking review in federal court of the ICC's March 11 Order pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 and 28 U.S.C. § 1331. Ameritech's five-count complaint alleges that the ICC's order is contrary to governing federal law.[1] As relief, Ameritech requests this court to declare that the term "local traffic" as used in the Agreements does not include Internet ISP calls, declare that the ISP calls are not subject to the payment of reciprocal compensation, and issue an injunction against the enforcement of the ICC's order.

Ameritech also filed a motion for stay of the ICC's order pending review. On May 1, 1998, this court issued a stay of the Order pending expedited review of the case on the merits. The defendant Commissioners have filed two motions to dismiss the plaintiff's complaint. Due to the expedited nature of this proceeding, the Commissioners' motions are not yet fully briefed, and will therefore be reviewed in a subsequent decision of this court. At this court's suggestion, the instant Opinion and Order are without prejudice to the Commissioners' positions raised in the motions to dismiss.

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[1] Count I alleges that the Commission's interpretation of the Agreements is erroneous as a matter of law because, pursuant to the Agreement, the Internet ISP calls are switched exchange access service. (Compl. ¶¶ 40-45.) Count II alleges that the ICC order is contrary to controlling FCC orders which hold that Internet ISP calls are exchange access traffic. (Compl. ¶¶ 46-51.) Count III alleges that the ICC's order violates controlling federal law which assigns authority over interstate communications to the FCC. (Compl. ¶¶ 52-56.) Count IV alleges that the ICC order violates sections 251(b)(5), 252(d)(2), and 251(g) of the 1996 Act. (Compl. ¶¶ 57-62.) Finally, Count V alleges that the ICC order must be set aside under Illinois law. (Compl. ¶¶ 63-4.) Not all of the counts alleged in the complaint were presented to this court in the final briefing on the merits.

II. BACKGROUND

A. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or "Telecommunications Act"), is intended to foster competition in local telephone service. The Act, which amends the Communications Act of 1934, works to open "all telecommunications markets through a pro-competitive, deregulatory national policy framework." In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 2 (Dec. 24, 1996) (hereinafter "Third Report and Order"). See generally MCI Telecommunications Corp. v. Bellsouth Telecommunications, Nos. 97 C 2225, 97 C 4096, 97 C 0886, 97 C 8285, 1998 WL 146678, at *1-2 (N.D. Ill. March 31, 1998); GTE South, Inc. v. Morrison, Jr., 957 F. Supp. 800, 801-02 (E.D. Va. 1997). The Act preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c)(2)(D) (1998).

Under Sections 251 and 252 of the Act, incumbent Local Exchange Carriers ("LECs") and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. See id. §§ 251(c), 252. Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission for arbitration. See id. § 252(b)(1). A final interconnection agreement, whether

negotiated or arbitrated, is reviewed by the state commission in order to determine whether it complies with the Act. See id. § 252(e)(1).

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section." Id. § 252(e)(6). Courts have found that review by the federal courts under Section 252(e)(6) of the Act extends to "the various decisions made by [state commissions] throughout the arbitration period which later became part of the agreement . . ." GTE South, 957 F. Supp. at 804.

B. STANDARD OF REVIEW

The Telecommunications Act does not explicitly state the standard that federal district courts should apply when reviewing the decision of a state commission. The Supreme Court has held that in situations "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 83 S. Ct. 1409, 1413 (1963) (citations omitted). Accordingly, review in the instant case is limited to the administrative record. See, e.g., U.S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 3 (W.D. Wash. Jan. 7, 1998).

Courts that have examined the standard to be applied in appeals from state commissions have found that the language of Section 252(e)(6) clearly limits a court's jurisdiction to determining whether the agreement meets the requirements of federal law, in particular, the Telecommunications

Act. See, e.g., Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 9 (W.D. Tex. June 16, 1998) (citing GTE Northwest, Inc. v. Hamilton, 971 F. Supp. 1350, 1354 (D. Or. 1997)). District courts reviewing decisions of state commissions agree that the commissions' interpretations of federal law are reviewed de novo, while all other issues, including factual findings, are reviewed with substantial deference. See, e.g., Southwestern Bell, No. 98 CA 043 at 10-11; U.S. West Communications, Inc. v. MFS Intelinet, Inc., No C 97-222WD (W.D. Wash. Jan. 7, 1998); GTE South, 957 F. Supp. at 804; U.S. West Communications, Inc., v. Hix, 986 F. Supp. 13, 17 (D. Colo. 1997); AT&T Communications of California, Inc. v. Pacific Bell, No. C 97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998). Courts have reasoned that such a standard furthers the goals of the Telecommunications Act because state commissions have "little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." Hix, 986 F. Supp. at 17.

This court agrees with the reasoning of the above-cited district courts regarding the standard of review for actions brought under the Telecommunications Act. In this two-tiered system of review, the court must first address whether the state commission's action in reviewing the interconnection agreements was procedurally and substantively in compliance with the Act and its regulations. See Southwestern Bell, No. 98 CA 043 at 10. If the court finds that the decision is consistent with federal law, the court must next determine whether the decision was arbitrary, capricious, or not supported by substantial evidence. Id. at 10-11. "Generally, an agency decision will be considered arbitrary and capricious if the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

that it could not be ascribed to a difference in view or the product of agency expertise." Hix, 986 F. Supp. at 18 (citing Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997)).

III. ANALYSIS

The case at bar is an issue of first impression for this court. Although one other district court, Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an ISP are "local traffic" and therefore eligible for reciprocal compensation),[2] and state commissions in 19 states, (Carrier Def.'s Ex. 6), have determined that LECs must provide reciprocal compensation for calls to the Internet, no federal court in the Seventh Circuit has yet to answer this question.

This case involves the arcane regulatory and contractual question of the appropriate compensation for LECs that terminate Internet traffic. Ameritech argues that such calls are properly classified as "interstate"[3] exchange access calls and therefore no reciprocal compensation should apply. The Carrier defendants and the Commissioners argue that such calls are "local" and therefore require reciprocal compensation under the terms of the Interconnection Agreements. Some review of relevant terminology and technology is useful for understanding the issue at bar, in particular, the

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[2] Another federal district court found, in reviewing an agreement approved by the Washington Utilities and Transportation Commission, that the state commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fee." U.S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 8 (W.D. Wash. Jan. 6, 1998) ("ESPs" refers to "Enhanced Service Providers," which include Internet Service Providers.).

[3] The Federal Communications Commission has determined that interstate telecommunications occur "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 112 (April 10, 1998).

billing procedures for local and long distance calls, as well as the growing phenomenon of the Internet and Internet Service Providers.

A. RECIPROCAL COMPENSATION

Section 251(b)(5) of the Telecommunications Act provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define "reciprocal" compensation as an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dockets 96-98 et al., First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 1034 (Aug. 8, 1996) (hereinafter "First Report and Order").

Reciprocal compensation applies only to local telecommunications traffic." 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." Id. § 51.701 (b)(1). Ameritech argues that Internet calls are not properly classified as "local" calls under the Interconnection Agreements at issue. Therefore, according to Ameritech, payment of reciprocal compensation is improper.

B. ACCESS CHARGES

"Access charges" are the fees that long distance carriers, known as interexchange carriers ("IXCs"), pay to LECs for connecting the end user to the long distance carrier. "Access charges were developed to address a situation in which three carriers – typically, the originating LEC, the IXC, and the terminating LEC – collaborate to complete a long-distance call." First Report and Order ¶ 1034. Typically, the long-distance carrier will pay both the terminating and originating LEC an access charge. The service provided by the LECs is known as "exchange access." The 1996 Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (1998).[4]

C. THE INTERNET

"The Internet is an international network of interconnected computers. . . . [which] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." Reno v. American Civil Liberties Union, --- U.S. ---, ---, 117 S. Ct. 2329, 2334 (1997) (footnote and internal citation omitted). The Internet functions by splitting up information into small chunks or "packets" that "are individually routed through the most efficient path to their destination . . . " In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45 (April 10, 1998) at ¶ 64 (hereinafter "Universal Service

[4] "Telephone toll service" is defined by the act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153 (48) (1998).

Report"). Despite the growing importance of the Internet in worldwide communications, "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet." Reno, --- U.S. at --- , 117 S. Ct. at 2338.

D. INTERNET SERVICE PROVIDERS

An Internet Service Provider ("ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with web sites. ISPs function by combining "computer processing information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." Universal Service Report ¶ 63. If an ISP is in a local calling area, the ISP customer dials a seven-digit number to access the ISP facility and is generally charged a flat fee for the ISP usage, in addition to the corresponding local fee rate for the call to the ISP [5] Among the services offered to many subscribers to the Internet are electronic mail, file transfers, Internet Relay Chat, and the ability to browse and publish on the World Wide Web. See, e.g., American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), aff'd, Reno v. American Civil Liberties Union, --- U.S. ---, 117 S. Ct. 2329 (1997).

ISPs have been exempted from paying "access charges" to LECs for connecting them to the end user. Third Report and Order ¶ 288. In 1983, the FCC classified ISPs as "end users" rather than

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[5] Typically, when an individual calls the Internet the call is routed to a "dial-in site," "a small physical location (a phone closet for instance) that contains the electronic equipment needed to accept modem calls and connect them to" the Internet. Haran Craig Rashes, The Impact of the Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 Temp. Envtl. L. & Tech. J. 49, 69 (1997) (internal citations and footnote omitted.) "Each Internet Service Provider may place anywhere from one or two to thousands of incoming lines and modems in the same location. An Internet Service Providers' equipment at local dial-in sites consists of banks or pools of modems configured in multi-line hunt groups, with one lead number serving as a central number to receive calls." Id.

as "carriers" for purposes of the access charge rules. Id. As a result of this decision, ISPs purchase services from LECs "under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates." Id. ¶ 285. In a 1996 Order reviewing the 1983 "exemption" decision, the FCC "tentatively conclude[d] that the current pricing structure should not be changed so long as the existing access charge system remains in place." Id. ¶ 288.

E. TELECOMMUNICATIONS VS. INFORMATION SERVICES

The FCC has repeatedly made it clear that "telecommunications" and "information services" are "mutually exclusive" categories. Universal Service Report ¶ 59. See also id. ¶ 57 ("[W]e find strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.") According to the FCC, such an interpretation is "the most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." Id. ¶59. The distinction drawn by the FCC mirrors the definitions of "telecommunications" and "information services" in the Act. "Information service" is defined by the Telecommunications Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (1998). "Telecommunications," however, is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43).

Following the definitions in the Act, the FCC has found that the key distinction between telecommunications and information services rests on the functional nature of the end user offering. Universal Service Report ¶¶ 59, 86. "[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." Id. ¶ 59.

Applying these definitions, the FCC has determined that Internet services are "information services" and not "telecommunications." See, e.g., Universal Service Report ¶ 66 ("Internet service providers themselves provide information services, not telecommunications . ."); Id. ¶ 80 ("The provision of Internet access service . . . is appropriately classed as an 'information service.'"); Id. ¶ 81 ("Internet access provider[s] . . . are appropriately classified as information service providers.").

There may be some rare instances, however, when the services provided by the Internet are actually telecommunications. For example, the FCC indicated in its recent report that "phone-to-phone telephony"[6] lacks the characteristics of information services, and could actually be classified as telecommunications services. Id. ¶ 89. However, the FCC reserved making any final ruling on the subject until a more complete record is established. See id. ¶ 90. See generally Robert M.

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[6] In phone-to-phone telephony, "the customer places a call over the public switched telephone network to a gateway, which returns a second dial tone, and the signaling information necessary to complete the call is conveyed to the gateway using standard in-band (i.e., DMTF) signals on an overdial basis. The customer's voice or fax signal is sent to the gateway in unprocessed form (that is, not compressed and packetized). The service provider compresses and packetizes the signal at the gateway, transmits it via IP to a gateway in a different local exchange, reverses the processing at the terminating gateway and sends the signal out over the public switched telephone network in analog, or uncompressed digital, unpacketized form." Universal Service Report ¶ 84, n. 177.

Frieden, Dialing for Dollars: Should the FCC Regulate Internet Telephony?, 23 Rutgers Computers & Tech. L. J. 47 (1997) (discussing the various policy issues that may arise from the development of Internet telephony).

F. THE INTERCONNECTION AGREEMENTS

At the heart of this dispute are the Interconnection Agreements which were entered into between Ameritech and the various Carrier defendants. All of the Agreements provide that "local traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation. Specifically, the Agreements state that:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1.) The Agreements define "local traffic" as "local service area calls as defined by the Commission," (TCG § 1.43), or as:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V & H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis in original). The Agreements further provide that "switched exchange access service" is not eligible for reciprocal compensation. (MFS § 5.8.3; TCG § 5.6.2; MCI § 4.7.2; AT&T § 4.7.2; Focal § 5.8.2). Switched exchange access service" is defined in the Agreements as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service," which includes "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and

900 access and their successors or similar Switched Exchange Access services." (MFS § 1.56; TCG § 1.65; MCI sch. 1.2; AT&T sch. 1.2; Focal § 1.66.)

The parties do not contend that the Agreements specifically classify the Internet as either local traffic or exchange access service. Indeed, this court could not find an express reference to the Internet in the various Interconnection Agreements.

G. THE COMMISSION'S DECISION

The Commission's Order concludes that Ameritech Illinois must pay reciprocal compensation to the Carrier defendants with respect to calls placed by Ameritech Illinois customers through the Internet via ISPs who are customers of the Carrier defendants.[7] In its decision, the Commission first reviewed the procedural history of the case and the positions of the parties. (Order

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[7] The Order states in the pertinent part:

> IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 14 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois
>
> IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extend Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

(Order at 16.)

at 1-10.) The Commission then presents a four-page analysis of the relevant facts and law for reaching its decision that reciprocal compensation applies to Internet calls.

The Commission's first reason for its decision is based on the language of the Agreements themselves. The Interconnection Agreements state that reciprocal compensation applies "for transport and termination of Local Traffic *billable* by Ameritech [or the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's [or the Carrier Defendant's] network for termination on the other Party's line." (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) (emphasis added). According to the Commission, the "billable" language in the Agreements "unambiguously provide[s] that reciprocal compensation is applicable to local traffic billable by Ameritech." (Order at 11.) Reasoning that Ameritech charges end users local service charges when completing calls that terminate at a competitor's ISP customer, the Commission concluded that "the plain reading" of the billable language necessitates reciprocal compensation charges for ISP calls. (Order at 11.)

The second rationale employed by the Commission is again dependent on the language of the Agreements. Specifically, the Agreements provide that reciprocal compensation applies for calls *terminated* on the other party's line. (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) The Commission found that a call to an ISP *terminates* at the ISP before it is connected to the Internet. (Order at 11.) The Commission was persuaded by the Carrier defendants' definition of industry practice, in which call termination "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (Order at 11, citing WorldCom Ex. 1.0 at 7.) According to the Commission, "termination" in the context of the Agreements does not mean that the call ends.

(Order at 11.) The Commission's view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements.

In the final part of the Commission's analysis, it rejected the argument made by Ameritech that a call's distance must be determined on an "end-to-end" basis, that is, from the end user to the web site. Such a reading would be an "outdated conception of the telecommunications network" and would be inconsistent with the Act and "the FCC's own decisions." (Order at 11-12.) In a rather confusing explanation of this point, the Commission states that Internet calls are unlike Feature Group A ("FGA") calls, which are classified in the Agreements as "switched access service." FGA calls are long distance calls that end users initiate by dialing a local seven-digit number. When the user dials the local number, she is connected to the interexchange carrier's toll switch which gives the user a second dial tone, at which point the user dials a long distance number. Although Ameritech argued that FGA calls are functionally identical to Internet ISP calls, the Commission found that such calls are distinguishable because FGA calls undeniably involve telecommunications traffic with the end user to which the call is terminated. In contrast, Internet calls involve what the FCC has found to be "information services" after the call is terminated to the ISP. "Based on these critical distinctions [between telecommunication traffic and information service] the FCC has determined that ISP traffic is not an exchange access service, but rather, ISPs should be treated as 'end users.'" (Order at 12.) (emphasis in the original)

H. FCC RULINGS

This court's role in reviewing the ICC's decision requires that it examine the court's interpretation of federal law de novo. See discussion, supra, Part II.B. Examining the FCC's interpretation of the relevant issue is therefore necessary because if this court finds that the FCC has

a reasonable and consistently held interpretation of the applicable law, those rulings would be entitled to substantial deference. Cf. Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 S. Ct. 1046, 1059 (1992); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). See also Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) ("An agency's construction of its own regulation binds a court in all but extraordinary cases."); United States v. Baxter Healthcare Corp., 901 F.2d 1401, 1407 (7th Cir. 1990) (finding that a court must give great deference to agency's interpretations of its own regulations).

After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a relatively new development to the telecommunications world, presents unique questions that have not previously been addressed by FCC decisions and policy. For example, the FCC recently initiated a Notice of Inquiry seeking comments on the effect of the Internet and other information services on the telephone network, noting that the Internet creates perplexing policy issues:

> [T]he development of the Internet and other information services raise many critical questions that go beyond the interstate access charge system that is the subject of this proceeding. Ultimately, these questions concern no less than the future of the public switched telephone network in a world of digitalization and growing importance of data technologies. Our existing rules have been designed for traditional circuit-switched voice networks, and thus may hinder the development of emerging packet-switched data networks. To avoid this result, we must identify what FCC policies would best facilitate the development of the high-bandwidth data networks of the future, while preserving efficient incentives for investment and innovation in the underlying voice network. In particular, better empirical data are needed before we can make informed judgments in this area

Third Report and Order ¶ 311.

This court's determination that no clear rule on the issue exists is confirmed by the fact that on June 20, 1997, the FCC expedited consideration of a request for clarification of its rules from the Association for Local Telecommunications. The issue under review is identical to the issue at bar: whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for transport and termination of traffic to LECs that are information service providers. See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, FCC Common Carrier Bureau/CPD 97-30,12 F.C.C. Rcd. 9715 (July 2, 1997). Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Order and Opinion, the issue has not been resolved. See also Memorandum of the Federal Communications Commission as Amicus Curiae, Mem. at 2, June 29, 1998, filed in Southwestern Bell, No. 98 CA 043 (stating that the issue of the rights of LECs to receive reciprocal compensation is "pending before the FCC in an administrative proceeding and remains unresolved). Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.

The Carrier defendants and the Commissioners argue that reciprocal compensation applies only to telecommunications, and, therefore, the fact that ISPs generally do not provide telecommunications necessitates a finding that reciprocal compensation must be paid to the terminating LEC. Ameritech responds, however, that such argument is a red herring. Ameritech relies heavily on the FCC's statement in its 1998 Universal Service Report that the issue of reciprocal compensation does not "turn on" on the telecommunications/information service distinction:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

¶ 106, n. 220. Although the statement of the FCC in Footnote 220 is ambiguous as it relates to the issues involved here, this court agrees with Ameritech to the extent that any rationale regarding whether reciprocal compensation must be paid for such calls cannot hinge entirely on the information service/telecommunications distinction. This does not mean, however, that the distinction does not exist[8] (see discussion, supra, Part III.E) or that an understanding of the distinction is wholly irrelevant to a discussion of the issue at bar.

Despite the fact that Ameritech shuns the information service/telecommunications distinction, it nonetheless argues that language in the FCC's reports indicating that Internet information services are provided via telecommunications is relevant to their argument. See Universal Service ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.'"); Id. ¶ 3 (stating that the Internet "stimulates our country's use of telecommunications"; ISPs are "major users of telecommunications."); Id. ¶15 ("[W]e clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.'"). Nonetheless, for the same reasons stated against the defendants' use of the distinction, this court finds that the fact that ISPs use telecommunications is not the determining factor in the instant case.

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[8] For example, at oral argument, counsel for the plaintiff clearly stated that it is "undisputed" that ISPs provide information services and are not providers of telecommunications. (Tr. at 31.)

Ameritech's reliance on language in the Universal Service Report indicating that the telecommunications backbone to the Internet is "interstate telecommunications" is more persuasive authority for of the plaintiff's view. See, e.g., Universal Service Report ¶ 55 ("We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide interstate 'telecommunications.' Internet service providers themselves generally do not provide telecommunications.") (emphasis added); Id. ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of interstate telecommunications. Telecommunications carriers offering leased lines to Internet service providers must include the revenues derived from those lines in their universal contribution base.") (emphasis added).

Although the characterization of leasing lines to local ISPs as providing "interstate telecommunications" causes this court to pause, ultimately this court is not convinced that such language compels a finding under federal law that a call from an end user to an ISP is an interstate call and that termination for billing purposes does not occur at the ISP. This court is especially skeptical of the above cited language from the Universal Service Report because of the context in which the term "interstate" is discussed. A great deal of the Universal Service Report discusses the future of the FCC's goal of providing "universal service," that is, services to all customers throughout the country, "including low-income customers and those in rural, insular, and high cost areas . . . at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3) (1998). Under the Telecommunications Act, carriers "that provide interstate telecommunications services must contribute to federal universal service mechanisms." Universal Service Report ¶ 55. A concern arises with the development of the Internet because, as information service providers, ISPs do not contribute directly to the development of universal service. Id.

Given this background, this court is not convinced that the use of the term "interstate" in the context of discussing the Internet means that the FCC has made a determination that calls to the Internet are "interstate" for billing purposes. Nor is this court persuaded that such statements would require the overturning of a state commission's finding that such calls terminate locally at the ISP. Instead, the FCC has only provided that those who lease lines to ISPs provide interstate telecommunications and therefore ISPs are contributing, albeit indirectly, to the goal of universal service. Id. In essence, by leasing their lines from telecommunications carriers that do contribute to the universal system, the ISPs are contributing to the continuation of the goal of universal coverage. See id. ¶68 ("Internet access, like all information services, is provided 'via telecommunications.' To the extent that the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism, that provides an answer to the concern . . . [that] there will no longer be enough money to support the infrastructure needed to make universal access to voice or Internet communications possible.") (footnote and internal quotations omitted).

The FCC has made statements acknowledging that calls to the Internet using a seven-digit number are "local." See, e.g., In re Access Charge Reform, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 342, n. 502 ("To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.") (emphasis added). The FCC has also indicated that rate structures for such calls are appropriately addressed by state, rather than federal, regulators. See id. ¶ 345–46 ("ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and

subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.") (emphasis added).[9]

Ameritech further argues, relying on decisions involving the creation of the access charge regime (see discussion, supra, Part III.B, III.D), that the FCC has ruled that Internet Calls are exchange access calls. For example, in 1983 the FCC stated that:

> Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . .Were we at the outset out impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983). Although the FCC has continued to uphold its ruling that ISPs are exempt from any access charges (see, e.g., Universal Service Report ¶ 146), the FCC has clarified its position in more recent rulings. In particular, the FCC has stated that due to "the evolution in ISP technologies and markets since we first established access charges

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[9] Ameritech states that most calls to ISPs are subject to flat (low) rate calls, and Internet calls tend to be longer than other types of calls. Under the current rate structure, Ameritech contends, if reciprocal charges are applicable to such charges Ameritech must pay more to the terminating LEC than it can bill its customers. Implicit in Ameritech's argument is the assertion that the reciprocal payments thus incurred far exceed the cost to the LEC for terminating the call. If that is true, it is unclear how the state regulators can adequately restore equity to the process except through some bifurcation which would assign a different reciprocal rate to ISP traffic. Merely raising the rates that the originating LEC charges its local customers would simply finance a windfall for the terminating LEC out of the pocketbooks of customers.

in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established." In the Matter of Access Charge Reform, First Report and Order, CC Docket Nos. 96-262 et al., FCC 97-158, ¶ 345 (May 16, 1997). Indeed, instead of classifying ISPs as IXCs, the FCC has maintained that ISPs are, and should remain, classified as end users. Id. ¶ 348. Furthermore, the FCC has concluded, at least "tentatively," that the current structure of charging ISPs as end users should "not be changed so long as the existing access charge system remains in place." Third Report and Order ¶ 288.

In conclusion, this court finds that at the time that the Agreements were entered into there was no clear FCC position on whether or not calls to Internet ISPs are interstate exchange access calls. The FCC is currently reviewing the very question at issue in this case. Accordingly, the answer to the question of the interpretation of the Agreements lies principally in contract interpretation. These are questions that this court must review with substantial deference to the ICC's findings.

I. FINAL ANALYSIS OF ICC DECISION

The ICC's decision states three reasons for rejecting Ameritech's argument. This court finds that the third reason, which is based principally on the information services/telecommunications distinction, is not relevant to the case at bar. (See discussion, supra, Part III.H.) However, as the third reason does not include incorrect statements of federal law and this court finds that the remaining two reasons stated in the Commission's opinion are sufficient to uphold the decision, Ameritech's request that the decision be set aside is rejected.

The third section of the ICC's analysis is less clear than the other two arguments. Indeed, the third argument is jumbled and difficult to decipher Without clearly linking its reasoning to its decision to uphold reciprocal compensation for Internet calls, the ICC states in one stream of reasoning (encompassing only one page of text) that: (1) end-to-end jurisdiction is "outdated"; (2) FGA calls are distinguishable from Internet calls; (3) the Internet provides "information services" and not "telecommunications"; and, (4) ISPs are not exchange access service, but rather "end users." (Order at 11-12.) In fact, this section of the Commission's opinion reads more like a selective review of FCC precedent than solid reasoning for supporting reciprocal compensation for Internet calls.

For the reasons already discussed, this court finds that these statements of the Commission, though overstated, are not expressly violative of existing federal law. However, to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis. The FCC has warned that this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic. See Universal Service Report ¶ 106, n. 220. Nonetheless, the Commission's analysis does not "turn on" this distinction. Furthermore, as the decision stands on its own based on the first two rationales, this court does not find that the Commission's discussion of the information service/telecommunications distinction provides a basis for reversal.[10]

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[10] Ameritech also criticizes the ICC's use of the distinction with Feature Group A calls ("FGA"), which is mentioned in the ICC's highlighting of the information service/telecommunications distinction in the third portion of its analysis. Ameritech stresses the point that FGA calls are "functionally and technically" indistinguishable from an Internet call.

Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

(Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed it customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts,[11] the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (See Ameritech Mem. at 17-18.)

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[11] See, e.g., Southwester Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); Long-Distance/USA, Inc., 10 F.C.C. Rcd. 1634, ¶ 13 (1995) (finding that 1-800 calls are a single communication; "both court and Commission decisions have considered the end-to-end nature of the communication more significant than the facilities used to complete such communications).